

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>KELSEY D. CLARK</b>	)	
Claimant	)	
VS.	)	
	)	
<b>MIGHTY MART, LLC</b>	)	Docket No. 1,063,594
Respondent	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

**STATEMENT OF THE CASE**

The Kansas Workers Compensation Fund appealed the April 4, 2013, preliminary hearing Order for Compensation entered by Administrative Law Judge (ALJ) Brad E. Avery. William L. Phalen of Pittsburg, Kansas, appeared for claimant. David J. Bideau of Chanute, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 1, 2013, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

**ISSUES**

ALJ Avery found claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent, but did not specify a date of accident in the Order. ALJ Avery then awarded claimant temporary total disability benefits commencing December 12, 2012, and ordered medical treatment with Dr. Michael Zafuta. Presumably, ALJ Avery determined claimant's date of accident was December 12, 2012, as that is the date claimant alleged in her Application for Hearing.

The Fund asks the Board to reverse ALJ Avery's Order and asserts: (1) the ALJ exceeded his jurisdiction by assessing liability against the Fund; (2) the ALJ erred by assigning liability against the Fund without first making a determination that respondent had no insurance and was financially unable to pay the ordered compensation to claimant

as no evidence was presented concerning respondent's financial ability to pay benefits; (3) on December 12, 2012, claimant did not work for respondent, but worked for A & A Kansas, Inc. (A & A), and, therefore, A & A was not given proper notice of the preliminary hearing; (4) claimant's personal injury by accident did not arise out of and in the course of her employment with respondent; and (5) the ALJ relied on evidence not contained in the preliminary hearing record.

Claimant asks the Board to affirm the ALJ's Order. Claimant alleges that: (1) she worked for respondent; (2) the name of the business on her paychecks was Mighty Mart; (3) an individual by the name of Athar Angum owns respondent, whether its name is Mighty Mart or A & A Kansas, Inc., d/b/a Mighty Mart; and (4) she gave proper notice by giving notice to Athar Angum and made a proper claim upon the entity doing business as Mighty Mart.

The issues before the Board are:

1. Did the ALJ consider evidence not contained in the preliminary hearing record?
2. Did claimant prove that she sustained a personal injury by accident arising out of and in the course of her employment with respondent? Specifically, was respondent claimant's employer on the date of accident?
3. Did the ALJ exceed his jurisdiction by assessing liability against the Fund?
4. If not, did the ALJ err by assigning liability against the Fund without first making a determination that respondent had no insurance and was financially unable to pay the ordered compensation to claimant?

#### **FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant worked as a cashier in a convenience store. During her shift on December 12, 2012, claimant lifted some trash and heard a pop in her back and experienced pain. No one witnessed the incident. Claimant testified that she had never had pain in that part of her body before. The next day, claimant reported what happened to the owner, Athar Angum. Mr. Angum would not send claimant to a doctor because his insurance would only cover her if she slipped and fell inside the store.

Claimant testified she sought medical treatment at SEK Urgent Care (SEK) on December 12, 2012,<sup>1</sup> where she was prescribed medication and given work restrictions. Claimant provided the restrictions to Mr. Angum, but he did not give claimant a job within those restrictions. Claimant returned to SEK on December 17, 2012, and was given restrictions. Claimant testified that the physician at SEK recommended x-rays, an MRI and physical therapy, but respondent would not provide those for her.

Claimant testified that 7 to 12 people worked at the convenience store and she and two other employees worked during her shift. During her shift on December 12, there was no supervisor. According to claimant, on the date of the accident Wendy Dunkin was the manager, but Ron Salazar also had been a manager. Claimant testified that at times she handed out paychecks to fellow employees. The checks were almost like personal checks, but had Mighty Mart on them. When asked if Mighty Mart was a corporation, claimant answered, "Their thing says Mighty Mart Corporation, so I'm assuming they are."<sup>2</sup> Claimant also testified, "Angum was the owner. He's the one that told us he was the owner."<sup>3</sup>

Mr. Salazar testified at the preliminary hearing that he worked for Mighty Mart for the past two and one-half years in some capacity. On December 12, 2012, he was the part-time manager. Mr. Salazar testified:

Q. (Mr. Bideau): And could you tell the court, is Mighty Mart a corporation?

A. (Mr. Salazar) It's A & A Kansas, Incorporated.

Q. What was that?

A. A & A Kansas, Incorporated, is the -- doing business as Mighty Mart.<sup>4</sup>

According to Mr. Salazar, Mr. Angum and Muhammad Loane were the principals in A & A. Mr. Salazar indicated Mr. Angum was not at the preliminary hearing because his wife recently had a baby. Mr. Salazar was asked if Mighty Mart was willing to provide medical treatment for claimant, but indicated he did not know and could not speak for Mr. Angum.

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<sup>1</sup> The records from SEK indicate the first visit by claimant was on December 13, 2012.

<sup>2</sup> P.H. Trans. at 23.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 25.

During the proceedings, Mighty Mart, A & A and Mr. Angum were not represented by an attorney. A demand letter, dated December 14, 2012, was sent by claimant's counsel via certified mail to respondent. It was addressed to:

Mighty Mart  
Attn: Manager or Supervisor of Kelsey D. Clark  
5005 Parkview Drive  
Frontenac, KS 66763<sup>5</sup>

The return receipt indicated that Wendy Dunkin signed for the letter on December 15, 2012.

#### **PRINCIPLES OF LAW AND ANALYSIS**

1. Did the ALJ consider evidence not contained in the preliminary hearing record?

The Fund asserted in its Application for Review and its brief that the ALJ relied on evidence not contained in the preliminary hearing record in reaching his April 4, 2013, preliminary hearing decision. However, the Fund does not set forth what evidence ALJ Avery considered that was not part of the preliminary hearing record. Moreover, this is an evidentiary issue, over which the Board does not have jurisdiction under K.S.A. 2012 Supp. 44-534a or K.S.A. 2012 Supp. 44-551.

2. Did claimant prove that she sustained a personal injury by accident arising out of and in the course of her employment with respondent? Specifically, was respondent claimant's employer on the date of accident?

K.S.A. 2012 Supp. 44-501b states in part:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the

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<sup>5</sup> *Id.*, Cl. Ex. 2.

claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

Claimant's testimony that she sustained a personal injury by accident on December 12, 2012, arising out of and in the course of her employment is uncontroverted. The underlying issue is whether respondent was claimant's employer on the date of accident. If A & A Kansas, Inc., was the owner of Mighty Mart, should the ALJ's Order be set aside as requested by the Fund? The Fund asserts that according to the Kansas Secretary of State, no entity by the name of Mighty Mart, LLC, exists in Kansas. However, no documents were produced by either party concerning the legal status of respondent or A & A. Nor did any owner, officer or director of respondent or A & A testify. When asked if Mighty Mart was a corporation, Mr. Salazar indicated that it was A & A Kansas, Incorporated, doing business as Mighty Mart.

Based upon the evidence in the record, this Board Member finds that on the date of the accident, claimant was an employee of respondent, which was owned by or part of A & A. Claimant testified her paychecks had Mighty Mart on them and she assumed Mighty Mart was incorporated. Notice of the accident was received by Ms. Dunkin, a manager of Mighty Mart. Mr. Salazar, another manager for respondent, testified that Mr. Angum was a principal of A & A, but could not attend the preliminary hearing because of a family matter. That indicates Mr. Angum and A & A were aware of the preliminary hearing, but chose not to participate. Letting the Fund stand behind the corporate shield of A & A would defeat the legislative intent of K.S.A. 2012 Supp. 44-501b(a).

3. Did the ALJ exceed his jurisdiction by assessing liability against the Fund?

The next issue is whether ALJ Avery exceeded his jurisdiction by assessing all benefits ordered against the Fund. K.S.A. 2012 Supp. 44-532a(a) provides that if an employer has no workers compensation insurance and is financially unable to pay compensation as required by the Kansas Workers Compensation Act, the ALJ may order the Fund to pay the benefits. Therefore, ALJ Avery had jurisdiction to assess liability against the Fund.

4. Did the ALJ err by assigning liability against the Fund without first making a determination that respondent had no insurance and was financially unable to pay the ordered compensation to claimant?

The Board does not have jurisdiction to review this issue. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.<sup>6</sup> This includes review of the preliminary hearing issues listed in K.S.A. 2012 Supp. 44-534a(a)(2) as jurisdictional issues, which are: (1) whether the worker sustained an accidental injury

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<sup>6</sup> K.S.A. 2012 Supp. 44-551(i)(2)(A).

or repetitive injury by trauma, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice, and (4) whether certain other defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>7</sup> In *Payne*,<sup>8</sup> a Board Member stated:

It may have constituted error for the ALJ to assign liability to the Fund without first making a determination that the respondent had no insurance and is financially unable to pay the ordered compensation to claimant, but such an omission does not render the order invalid or subject to an appeal at this stage of the proceedings. As counsel are aware, the Board has stated on numerous occasions that its jurisdiction to hear appeals from preliminary hearing orders is limited.

When the record reveals a lack of jurisdiction, the Board’s authority extends no further than to dismiss the action.<sup>9</sup> Accordingly, the appeal of the issue that ALJ Avery erred by assigning liability against the Fund without first making a determination that respondent had no insurance and was financially unable to pay the ordered compensation to claimant is dismissed.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>10</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>11</sup>

**WHEREFORE**, the undersigned Board Member affirms the April 4, 2013, preliminary hearing Order for Compensation entered by ALJ Avery.

**IT IS SO ORDERED.**

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<sup>7</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>8</sup> *Payne v. Copp Transportation*, No. 268,622, 2007 WL 1041038 (Kan. WCAB Mar. 8, 2007).

<sup>9</sup> See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

<sup>10</sup> K.S.A. 2012 Supp. 44-534a.

<sup>11</sup> K.S.A. 2012 Supp. 44-555c(k).

Dated this \_\_\_\_ day of July, 2013.

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THOMAS D. ARNHOLD  
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge